Supreme Court, U.S.
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No. 04-246

IN THE

Supreme Court of the United States

AQUALINE ASSOCIATES, LTD.,

Petitioner,

v.

GENESIS HEALTH VENTURES, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT GENESIS HEALTH VENTURES, INC.

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Genesis Health Ventures, Inc., has no parent corporation and Goldman Sachs is the only publicly held company that owns 10% or more of its stock.

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INTRODUCTION

The District Court relied upon well-established rules of bankruptcy law and Rule 12(b)(6) to properly dismiss Petitioner's First Amended Complaint. The United States Bankruptcy Code is unequivocal in granting relief to a debtor who has received a discharge. *See* 11 U.S.C. § 1141(a). Accordingly, claims that are discharged in bankruptcy may not be pursued, and a challenge to the effectiveness or validity of the bankruptcy discharge is properly made in the judicial district where the discharge was effected. *See* 28 U.S.C. § 158; *In re Varat Enter. Inc.*, 81 F.3d 1310, 1315 (4th Cir. 1996). As to any post-discharge claims, a plaintiff must allege a set of facts upon which relief can be granted. FED. R. CIV. P. 12(b)(6).

Petitioner does not offer any novel legal arguments or reasons to warrant the issuance of a writ of certiorari. Instead, this Petition involves erroneous legal arguments, together with erroneous factual assertions, all of which have been rejected by the District Court and the Fourth Circuit. These courts have properly determined that Petitioner's redress from Respondent, if any at all, is properly obtained from the Delaware Bankruptcy Court. Petitioner is not entitled to relief merely because of dissatisfaction with the results it has obtained.

STATEMENT OF THE CASE

In August, 2002, Petitioner Aqualine Associates, Ltd. ("Aqualine") filed its Complaint against Respondent Genesis Health Ventures, Inc. ("Genesis") in the District Court for the District of Maryland, asserting a claim for tortious interference with Aqualine's attempt to sell its nursing home in the fall of 1996. Pet. App. at 2. Genesis filed a Motion to Dismiss, arguing that Aqualine's claim was barred because Genesis filed for bankruptcy

on June 22, 2000, and its plan of reorganization was confirmed on September 20, 2001, effectively discharging any prior debts pursuant to 11 U.S.C. § 1141(d). *See id.* at 2.

The District Court heard Genesis' Motion to Dismiss on November 27, 2002, and initially denied the motion. *See id.* At the hearing, however, Genesis orally moved for the dismissal of all claims for torts allegedly committed *prior* to the bankruptcy discharge. *See id.* at 10. The Court stayed the case with respect to Aqualine's claims based on pre-discharge torts and ordered the parties to brief the Court on pre-discharge claims. *See id.* at 10-11. The Court permitted four months of discovery regarding the alleged post-discharge torts. *See id.* at 11.

In December, 2002, Aqualine moved for leave to file an Amended Complaint, and submitted a "Proposed First Amended Complaint" that alleged claims for tortious interference, conspiracy, and fraud and misrepresentation. *See id.* at 12. Aqualine failed to timely file any interrogatories or requests for documents. *See, e.g., id.* at 3 n.1. Aqualine never noted a corporate designee deposition of Genesis pursuant to FED. R. CIV. P. 30(b)(6). *See id.* Aqualine pursued no discovery until Genesis served its 30(b)(6) deposition notice. *See id.*

On April 8, 2003, the District Court dismissed Aqualine's Complaint in its entirety and denied Aqualine's Motion for Leave to file its proposed First Amended Complaint without prejudice. *See id.* at 12. Addressing Genesis' motion to dismiss pre-discharge claims, the District Court stated that although Aqualine had presented several theories as to the purported ineffectiveness of the bankruptcy discharge (e.g., inadequate bankruptcy notice), the plan of reorganization approved by the Bankruptcy Court is entitled to "res judicata effect" and "effectively precluded the pursuit . . . of any Pre-discharge claims." *Id.* at 14-15. The District

Court noted that to the extent that the validity of the Bankruptcy Court action could be challenged, Aqualine should proceed in that forum. *Id.* The District Court further stated that it would abstain from deciding any issue concerning the effectiveness of the bankruptcy discharge in order to allow the Bankruptcy Court to resolve such issue. *Id.* Based on this reasoning, the Court dismissed Aqualine's pre-discharge claims "without prejudice to [Aqualine's] proceeding, as may be appropriate," in the Bankruptcy Court in Delaware. *Id.* at 15. Finding that the Complaint did not contain any "clearly discernible Post-discharge claims," the District Court dismissed the Complaint in its entirety. *Id.*

The District Court's April 8, 2002 Order also denied Aqualine leave to file its proposed First Amended Complaint, without prejudice, and instructed it to file "an Amended Complaint that clearly and adequately presents any Post-discharge claims." *Id.* at 17. Aqualine was told it had to provide "specific allegations" establishing a post-discharge accrual of any causes of action. *Id.* at 16.

Aqualine filed an Amended Complaint on April 28, 2003 alleging tortious interference with economic relations, conspiracy, and fraud and misrepresentation. *Id.* at 32. In response, Genesis filed a Motion to Dismiss Amended Complaint, Or In The Alternative, For Summary Judgment, and for Sanctions. *Id.* at 18. Genesis' motion was based upon Aqualine's utter failure to state any new facts upon which to base its post-discharge claims. *Id.* Aqualine continued to allege that Genesis had begun a tortious "course of conduct" in 1996 that continued through the filing of the Amended Complaint. *Id.* at 34.

On June 16, 2003, the District Court granted Genesis' Motion and dismissed Aqualine's Amended Complaint with prejudice. *Id.* at 18. The District Court stated that "Aqualine

can only survive [the] motion if it has alleged any cognizable cause of action that accrued after September 21, 2001" (the date of the bankruptcy discharge), and it found "beyond doubt that Aqualine can prove no set of facts that occurred post-bankruptcy discharge to support its claims." *Id.* at 21. With respect to the tortious interference claim, the District Court noted that the Amended Complaint is "completely devoid of any reference to a date for any of the acts that allegedly constitute tortious interference," and it found Aqualine's "overbroad and sweeping allegations" about Genesis' continuing "course of conduct" to be insufficient to satisfy the specificity required by the April 8 Order. *Id.* at 22. The fraud and misrepresentation claim was similarly "devoid of any reference to any false statements made, or dates upon which any of the alleged fraudulent acts occurred," and it therefore fails to comply with the "specific warning" about compliance with Rule 9(b) and the need to allege post-discharge acts. *Id.* at 25.

Finally, the District Court concluded that the failure of Aqualine's tortious interference and fraud/misrepresentation claims necessitated the failure of the conspiracy claim because the conspiracy claim was (under Maryland law) dependent on those claims. *Id.* at 23. The Court noted that although the complaint "alleges that a conspiracy took place, and identifies acts that it believes show the existence of a conspiracy, the last act of the conspiracy alleged by the plaintiff occurred well before the discharge in bankruptcy. Plaintiff cannot simply allege conspiracy to circumvent the effect of the bankruptcy discharge." *Id.* at 24.

Aqualine appealed to the Fourth Circuit, which, after oral argument, issued a per curiam opinion affirming the lower court's decision, "on the reasoning of the district court." *Id.* at 1, 6. Aqualine's request for Rehearing En Banc was denied by that Court on June 2, 2004. *Id.* at 30.

CLARIFICATION OF THE RECORD

Aqualine's recitation of the facts and lower court proceedings bear little resemblance to the record facts and proceedings below, which are correctly set forth above. The Petition liberally and inaccurately describes the District Court's November 27, 2002 Order, failing to explain the pre and post discharge elements to Genesis' motions and Judge Garbis' Order. Pet. at 3. The Court stayed the case with respect to Aqualine's claims based on any pre-discharge torts, and ordered briefing, and permitted the parties to conduct four months of discovery on Genesis' alleged tortious acts committed after the bankruptcy discharge. Aqualine's assertion that it was denied any meaningful discovery is erroneous.

The Petition further mischaracterizes the District Court's April 8, 2003 Order, stating that Genesis' immunity regarding pre-discharge claims "is *totally* at odds with Judge Garbis' ruling of April 8, 2003 and the clear language of Genesis' own Plan of Reorganization — *tort claims such as those alleged by Aqualine, are to be tried in a non-bankruptcy court under non-bankruptcy law.*" Pet. at 11. The April 8th Order in fact dismissed Aqualine's pre-discharge claims without prejudice to proceeding in the Bankruptcy Court for the District of Delaware. Genesis did not misrepresent the language of the Plan to the lower court. Pet. at 10. Neither did Genesis deliberately fail to give Aqualine notice of its bankruptcy. *Id.* at 12-14. Genesis had no knowledge of Aqualine's claim until it filed its Complaint in the District Court. Regardless, the publication notice ordered by the Bankruptcy Court was legally sufficient notice to Aqualine.

Finally, the Petition misrepresents that Aqualine's cause of action accrued in January of 2002 when Aqualine sold its nursing home for less than it wanted (Pet. at 8); a tort action generally accrues on the date of the wrong, not the date one suffers damage. *Murphy v. Merzbacher*, 697 A.2d 861, 864 (Md. 1997).

REASONS FOR DENYING THE PETITION

The decision below is not in conflict with a decision of this Court, any United States Court of Appeals, or the Maryland state courts. The District Court and Fourth Circuit have not departed from the accepted and usual course of judicial proceedings necessitating the exercise of this Court's supervisory power. SUP. CT. R. 10. Instead of presenting certiorari worthy issues, Aqualine merely asks this Court to review each determination made by the lower courts which did not go its way, despite the fact that the decisions were well grounded.

I. The Fourth Circuit Did Not Rule In A Manner Which Is Inconsistent With *United States v. Jimenez Recio, et al.*, 537 U.S. 270 (2003).

In its struggle to fashion an argument that would warrant the involvement of this Court, Aqualine settles on the flawed premise that this Court's holding in *United States v. Jimenez Recio, et al.*, 537 U.S. 270 (2003), is applicable to its claim of *civil conspiracy*. Aqualine argues that Genesis had an affirmative duty to withdraw, abandon or disavow the conspiracy allegedly commenced before its bankruptcy; and, because it failed to abandon such unlawful conspiracy, that alleged conspiracy survives the bankruptcy discharge. Aqualine acknowledges that *Jimenez Recio* does not involve a case of civil conspiracy — indeed the case involves only a drug related criminal conspiracy. Without legal support, Aqualine baldly contends that "the reasoning is applicable to this case." Pet. at. 8. Petitioner's legal theory has no basis at law, and good legal authority exists supporting the lower court's dismissal of these claims.

The holding in *Jimenez Recio* has no application to a claim for civil conspiracy. This Court and other courts historically treat

criminal conspiracies much differently than alleged civil conspiracies. For a criminal conspiracy, there is no need to prove that the conspiracy led to an injury; thus, a person may be liable for criminal conspiracy even if they do not commit the substantive offense. *See Salinas v. United States*, 522 U.S. 52, 64 (1997). In contrast, liability for civil conspiracy only attaches when acts of a tortious character carry the conspiracy into execution. *Beck v. Prupis, et al.*, 529 U.S. 494, 501 (2000); *see also West v. Carson, et al.*, 49 F.3d 433, 436 (8th Cir. 1995) ("The focal point of the law of civil conspiracy is the act done in furtherance of the conspiracy, not the conspiracy itself."); *Wells v. Rockefeller, et al.*, 728 F.2d 209, 217 (3d Cir. 1984) ("In the civil case, actual injury is the focal point, not the illegal agreement per se, as is true in the criminal context."); *Lewis Invisible Stitch Mach. Co. v. Columbia Blindstitch Mach. Mfg. Corp.* 80 F.2d 862, 864 (2d Cir. 1936) (". . . whatever may be the rule in criminal conspiracies, it is well settled that the civil liability does not depend upon the confederation, . . . but upon the acts committed in realization of the common purpose.").

The Maryland Court of Appeals has had the occasion to specifically address the disparity between civil and criminal conspiracy law, and has observed ". . . the elements necessary to give rise to criminal liability are quite different than those required for civil liability." *See Alleco, Inc. v. Harry & Jeanette Weinberg Found. Inc.*, 639 A.2d 173, 177 (Md. App. 1994), *aff'd*, 665 A.2d 1038 (Md. 1995).

> The gist of a *criminal* conspiracy is an agreement between two or more persons to commit another crime. The crime of conspiracy is complete when the unlawful agreement is reached; no overt act in furtherance of the agreement is necessary. That is not the case with a civil conspiracy; indeed, a

> converse rule applies. The gist of a civil conspiracy is not the agreement but rather the overt conduct committed pursuant to it and the harm that flows from that conduct. It is a very different kind of animal, but one that borrows from its criminal cousin the notion of mutual agency and joint liability.

Id.

To recover for civil conspiracy in Maryland a plaintiff must show: (1) a confederation of two or more persons by agreement or understanding; (2) some unlawful or tortious act done in furtherance of the conspiracy or use of unlawful or tortious means to accomplish an act not in itself illegal; and (3) actual legal damage resulting to the plaintiff. *Robb v. Wancowicz*, 705 A.2d 125, 132 (Md. 1998). Thus, conspiracy is not a separate tort capable of independently sustaining an award of damages in the absence of other tortious injury to a plaintiff. *Alleco, Inc. v. Harry & Jeanette Weinberg Found., Inc.*, 665 A.2d 1038, 1045 (Md. 1995). In other words, a conspiracy standing alone is not actionable. *Van Royan v. Lacey*, 277 A.2d 13, 14 (Md. 1971).

The District Court and Fourth Circuit properly held that because neither Aqualine's tortious interference claim, nor its fraud claim, survived Genesis' Motion to Dismiss — because of Aqualine's complete failure to plead post-discharge acts — its conspiracy claim was similarly deficient, and also must be dismissed. Pet. App. at 23. Aqualine supplemented its complaint with the conspiracy count to attempt to circumvent the fact that its cause of action occurred prior to the discharge. *Id.* at 24. Alleging a conspiracy, however, does not negate the requirement that a plaintiff allege the overt act that serves as the source of the plaintiff's injury. *See id.*

II. The Fourth Circuit Applied The Proper Standard For A Rule 12(b)(6) Dismissal.

It is well established that under Federal Rule of Civil Procedure 12(b)(6), dismissal of a complaint for failure to state a claim is not appropriate "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). When ruling on a 12(b)(6) motion, a court must accept the allegations contained in the complaint as true. *See DeBauche v. Trani*, 191 F.3d 499, 505 (4th Cir. 1999). The Court is not, however, "bound by the plaintiff's legal conclusions, since the purpose of Rule 12(b)(6) is to test the legal sufficiency of the complaint." *Randall v. United States*, 30 F.3d 518, 522 (4th Cir. 1994) (reiterating that a plaintiff's legal conclusions merit no deference in deciding a motion to dismiss). Pet. App. at 20.

Aqualine's argument — that the District Court and Fourth Circuit violated the principles of Rule 12(b)(6) — has no basis in law or fact. Because Aqualine has not and cannot plead sufficient allegations to sustain any claim, it makes the halfhearted argument that the lower courts applied the wrong standard to its allegations. The courts below, however, gave "due consideration" to the complaint, and held that "it appears beyond doubt that Aqualine can prove no set of facts that occurred post-bankruptcy discharge to support its claims."[1] Pet. App. at 21.

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1. Aqualine's claims for fraud and conspiracy are subject to Federal Rule of Civil Procedure 9(b), which provides that "[I]n all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity." FED. R. CIV. P. 9(b). The particularity requirements found in Federal Rule 9(b) are equally applicable to claims for conspiracy to commit fraud as they are to basic fraud claims. *Adams v. NVR Homes, Inc.*, 193 F.R.D. 243 (D. Md. 2000).

Aqualine assumes that its claim for conspiracy passes muster under 12(b)(6) just because it says it does:

> This was a conspiracy which was conceived and pursued before, during and after Genesis' bankruptcy. *That is what the First Amended Complaint says and that is what the court refused to accept as true for purposes of a 12(b) [sic] motion.*

Pet. at 15. Aqualine is correct to point out that its allegations must be accepted as true. However, here, Aqualine only provides legal conclusions. The courts below did not err in concluding that Aqualine failed to state a cause of action upon which relief could be granted.

III. The Fourth Circuit Properly Held That The Bankruptcy Court Discharged Genesis From Aqualine's Pre-September 20, 2001 Claims And That The Validity Of The Bankruptcy Discharge Proceeding Is Properly Challenged In The Bankruptcy Court.

The Bankruptcy Code is clear as to the effect of a discharge. Section 1141(a) of the Bankruptcy Code provides that a confirmed plan binds any creditor whether or not the claim or interest of such creditor is impaired under the plan and whether or not such creditor has accepted the plan. *See* 11 U.S.C. § 1141(a).[2] The confirmation of a plan discharges the debtor from any debt that arose prior to the date of confirmation.

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2. The term "claim" is given the broadest possible definition to be a "right to payment whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured." 11 U.S.C. §§ 101(5), (12).

Id. at § 1141(d)(1)(A). Such debts are discharged regardless of whether a proof of claim on such debt was filed or whether the claimant accepted the plan. *Id.* Furthermore, the Bankruptcy Codes provides that a discharge operates as an injunction against the commencement or continuation of an action or an act to collect a discharged debt. *See* 11 U.S.C. § 524(a)(2).

Consequently, as the District Court simply stated, and the Fourth Circuit confirmed, the confirmation of Genesis' Plan was binding on all creditors of the debtor, and effectively precluded the pursuit of any pre-discharge claims, such as the claims Aqualine asserts in its Amended Complaint. *See* 11 U.S.C. § 524, (A, 1141 (a)-(d)); *see, e.g., In re Rosenfeld*, 23 F.3d 833, 836 (4th Cir. 1994). The District Court's dismissal of Aqualine's pre-discharge claims is a straightforward enforcement of the Bankruptcy Court's September 20, 2001 Confirmation Order.

Despite this clear pronouncement, Aqualine insists that its claims have not been discharged. Ironically, Aqualine argues that Genesis and the lower courts relied on Genesis' bankruptcy in "confusing logic" which suggests that Genesis is entitled to some kind of transactional immunity. Pet. at 11. Aqualine's arcane reading of the Bankruptcy Code and Genesis' Plan of Reorganization somehow leads it to believe that its claims are "specifically excluded . . . from the bankruptcy." *Id.* at 10. In support of its position, Aqualine cuts and pastes incomplete phrases from several sections of the Plan in no coherent or logical manner. *Id.* at 11. The bits and pieces Aqualine extracts from the Plan are senseless and do nothing to further its argument. Aqualine has its construction precisely backwards. In reality, Aqualine's argument is nothing but a broadside attack on the Bankruptcy Code and the legality of the discharge available to a debtor under the Bankruptcy Code.

Faced with the clear mandate of the Bankruptcy Code and Genesis' Plan of Reorganization, which expressly preclude Aqualine's pursuit of the kind of pre-September 20, 2001 claims alleged in its Amended Complaint, Aqualine attempts to attack the validity of the bankruptcy court proceeding itself and argue that it was not given proper notice of the bankruptcy in violation of its constitutional rights. Aqualine claims that the lower courts treated its concerns as nothing more than an inconvenience. Pet. at 12. Again, Aqualine improperly represents the lower courts' opinion in just another attempt to create an appellate issue where none exists.

Aqualine's argument concerning the alleged inadequacy of notice in the bankruptcy action is properly presented to the Bankruptcy Court. As recognized below, the action of the Bankruptcy Court, once it became final, must be given effect by the District Court. *See In re Varat Enter., Inc.*, 81 F.3d 1310, 1315 (4th Cir. 1996). "A bankruptcy court's order of confirmation is treated as a final judgment with *res judicata* effect." *Id.* "Pursuant to 11 U.S.C. § 1141 (a), all parties are bound by the terms of a confirmed plan of reorganization." *Id.* The District Court properly held that to the extent, if any, that Aqualine may be able to attack the validity of the Bankruptcy Court action, it should proceed in the Bankruptcy Court in Delaware.[3] *See* Pet. App. at 15; 28 U.S.C. § 158.

This Court's decisions in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) and *City of New York v. New York, New Haven & Hartford R.R. Co.*, 344 U.S. 293 (1953), are not to the contrary. They held that Fifth

3. The Court explained that to the extent, if any, that it had concurrent jurisdiction to rule upon the effectiveness of the discharge, the Court would abstain so that the issue could be resolved by the Bankruptcy Court for the District of Delaware. *Id.*

Amendment due process considerations take precedence over the discharge provisions of Section 1141 of the Bankruptcy Code, in cases where the debtor has knowledge of claims and fails to inform the claimants of the pendency of the proceedings. *Mullane*, 339 U.S. at 314; *City of New York*, 344 U.S. at 296. The lower courts' decisions in this case do not run afoul of this rule. Instead, Aqualine was directed to present its argument to the District Court for the judicial district in which Genesis' bankruptcy was confirmed. Aqualine has chosen not to object or appeal the Confirmation Order in the District of Delaware.

IV. The Fourth Circuit Properly Denied Discovery On Aqualine's Pre-Discharge Allegations; Aqualine Was Permitted Four Months Of Discovery On Alleged Post-Discharge Claims.

Aqualine's final argument about discovery is easily disposed. Aqualine's argument puts the proverbial cart before the horse by arguing that the judicial system entitles a party to discovery before the party is even required to state a claim upon which relief can be granted. In any event, Aqualine was in fact given four months to conduct discovery on its post-discharge claims, prior to the filing of its First Amended Complaint. Thus, even after discovery, Aqualine could not (and did not) state a cause of action.

Aqualine was not permitted to conduct discovery on its pre-discharge claims because, as stated above, the Bankruptcy Code, Genesis' Plan of Reorganization, and the Bankruptcy Court's Confirmation Order all require dismissal of Aqualine's pre-discharge claims. No amount of discovery will change the fact that Aqualine is barred from pursuing any alleged pre-discharge claims against Genesis.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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